F. L. Smithe Machine Company, Inc. *and* District Lodge No. 98, International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 6–CA–22981 and 6–RC–10494

January 8, 1992

DECISION, ORDER, AND DIRECTION

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On September 11, 1991, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.[1] The Respondent filed a brief in reply to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] as modified below, and to adopt the recommended Order as modified.

The judge found, and we agree for the reasons given by the judge, that the Respondent violated Section 8(a)(1) of the Act by threatening employees with reduced hours and plant closure, interrogating employees concerning their union activities and those of other employees, and creating the impression of surveillance. We further adopt the judge's findings that the Respondent violated Section 8(a)(3) of the Act by terminating Michael Hollern and by reducing the work hours of, and thereafter terminating, Steve Rossman. We also find, as did the judge, that the Respondent's unfair labor practices were so serious and pervasive as to warrant the imposition of a *Gissel*[4] bargaining order. The Respondent's conduct affected all of the unit employees and included threats of plant closure and discriminatory layoffs of union adherents, ''hallmark violations'' of the Act that are likely to have a lasting destructive effect on election conditions.[5]

The judge found that the unfair labor practices alleged as objectionable conduct also warranted setting aside the election in the consolidated representation case. Because he had set aside the election, the judge concluded that challenges to the ballots of Hollern and Rossman were moot. We disagree that the challenges are moot. We have found, in agreement with the judge, that Hollern and Rossman were unlawfully discharged. Accordingly, they were entitled to vote in the election, and we find that their ballots should be opened and counted. If, on the basis of these ballots, the Petitioner wins the election, it is entitled to a certification of representative. This certification of representative shall be in addition to our bargaining order. See *Eddyleon Chocolate Co*., supra; *Moe Warehouse & Accessory*, 275 NLRB 1132 (1985).

Accordingly, we shall remand the proceedings in Case 6–RC–10494 to the Regional Director and direct him to open and count the ballots of Michael Hollern and Steve Rossman and issue a revised tally of ballots. If the revised tally of ballots shows that the Petitioner has lost the election, we shall order that the results of the election be set aside, that the petition be dismissed, and that the bargaining order be given effect. If the revised tally of ballots shows that the Petitioner has won the election, the bargaining order shall be given effect and, in addition, the Regional Director shall issue a certification of representative. We modify the judge's recommended Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, F. L. Smithe Machine Company, Inc., Duncansville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following unnumbered provisions following paragraph 2(f).

''IT IS ORDERED that the challenges to the ballots of Michael Hollern and Steve Rossman are overruled.

''IT IS FURTHER ORDERED that Case 6–RC–10494 is severed from Case 6–CA–22981, and that it is re-

[1] The Respondent submitted with its brief a posthearing affidavit by its industrial relations manager, Henry Codd, attesting to the Respondent's posthearing operational status. The General Counsel moved to strike the affidavit. We find that the evidence presented in the affidavit would not affect the outcome of the case, and we grant the General Counsel's motion. *Robinson Bus Service*, 292 NLRB 70 (1988), cited by the Respondent, does not suggest a contrary result. The main issue in that case was whether the Board had jurisdiction over an employer engaged in providing bus transportation for private and public entities. There the employer bargained unsuccessfully for a year with the duly elected and certified representative of its employees, then asserted doubt of the union's majority status and withdrew recognition. The Board found that the employer violated Sec. 8(a)(5) of the Act. However, the Board granted the employer's motion to reopen the record to admit evidence bearing on the posthearing imposition by a state board of education of a new drug-testing requirement on the employer and other vendors of transportation services. Because the evidence was relevant to the Board's prospective bargaining order, the Board admitted the evidence. Here the affidavit offered by the Respondent has no such prospective relevance to our bargaining order.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We correct the judge's Conclusions of Law 4 and 5 to refer to dates in 1990 rather than in 1989.

[4] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

[5] See *Eddyleon Chocolate Co*., 301 NLRB 887 (1991).

manded to the Regional Director for Region 6 for action consistent with the direction below.

2. Add the following direction at the conclusion of the Order.

DIRECTION

''IT IS DIRECTED that the Regional Director for Region 6 shall, within 10 days from the date of this decision, open and count the ballots of Michael Hollern and Steve Rossman, and that he prepare and serve on the parties a revised tally of ballots.

''If the final revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 6–RC–10494.''

Julie Rose Stern, Esq., for the General Counsel.
Richard K. Muser, Esq., of New York, New York, for the Respondent Employer.
Eugene Marcaccio, Esq., of Stamford, Connecticut, for the Charging Party Petitioner.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. On October 12, 1990, District Lodge No. 98, International Association of Machinists and Aerospace Workers, AFL–CIO (Union or Charging Party) filed objections to the election in Case 6–RC–10494 which had been held on October 5, 1990, in a unit of production and maintenance employees employed by F. L. Smithe Machine Company, Inc. (Employer or Respondent) at its production facility in Duncansville, Pennsylvania. The election unit consisted of four employees: one voted for the Union, one voted against the Union, and two ballots were challenged by the Employer. Those ballots, cast by Michael Hollern and Steve Rossman, were challenged on the grounds that they had been permanently laid off. An order consolidating cases, and an order directing hearing on objections and challenged ballots and notice of hearing issued on October 22, 1990, consolidating for hearing the objections and challenged ballots with the unfair labor practice previously issued on October 18, 1990, and subsequently amended on October 25, 1990. The allegations of objectionable conduct and challenged ballots are coextensive with the allegations of the amended complaint.

Answers were timely filed by Respondent. The hearing was held before the administrative law judge on February 11 and 12, 1991. Briefs have been timely filed by General Counsel, Respondent, and Union, which have been considered.[1]

[1] No opposition thereto having been filed, the General Counsel's motion to correct transcript is granted.

FINDINGS OF FACT[2]

I. EMPLOYER'S BUSINESS

The Employer is a New York corporation[3] with an office and production facilities in Duncansville, Pennsylvania, where it is engaged in the manufacture and nonretail sale of envelope making machines. During the 12-month period ending September 30, 1990, Respondent sold and shipped goods and materials valued in excess of $50,000 from its Duncansville, Pennsylvania facility directly to points located outside the Commonwealth of Pennsylvania. The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

As noted above, Respondent is a manufacturer of envelope making machines. The basic production facility, or main plant, employs some 520 individuals. About 365 of those are production and maintenance employees represented under contract by the Union. Respondent also operates a separately located urethane plant where plastic components are added to parts manufactured at the main plant. The urethane plant employed four production employees, Carnell, Rossman, Hollern, and leadman Jim Lindsey. None of the urethane plant employees are organized. Their supervisor is Jim Warner. Two of the four employees, Hollern and Rossman, are alleged to have been discriminatorily discharged.

It appears that in early June 1990, Carnell, Hollern, and Rossman were assigned to sort out a shipment of mixed parts from a New York supplier before the parts were sent to the main plant. While so engaged, they were observed by main plant Union Steward Bob Miller who told them that this was bargaining unit work and that he would have to file a contract grievance over nonunit employees doing such work. Miller also took the opportunity to ask if they would be interested in union representation for themselves. They were, and a meeting was arranged with Pete Mathieus, president of

[2] There is conflicting testimony regarding some of the allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of each witness, I rely specifically on his demeanor and make my findings accordingly. And while apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco, Inc.*, 159 NLRB 1159, 1161 (1966). I also note, as to the testimony of Paul Carnell, that he is still employed by Respondent. His testimony was therefore against the interest of his employer, thus enhancing its credibility.

[3] Complaint was amended at hearing to reflect that Respondent is a New York rather than a Pennsylvania corporation.

Local 2348 of the IAM, followed by a meeting on June 18 with IAM Special Representative Steve Miller. At the June 18 meeting, Miller advised them about the process for organizing, and all three signed union authorization cards indicating their desire to be represented by the IAM.

After this meeting, by letter dated July 24, Steve Miller advised Respondent that it represented a majority of the production and maintenance employees in the urethane plant and requested recognition as their collective-bargaining representative. By letter from Henry W. Codd, industrial relations manager, dated Monday, July 30, 1990, Respondent rejected this request for recognition, asserting a good-faith doubt that the Union represented a majority of the unit employees.

On the same day, Warner met with all four production employees in the lunchroom at the urethane plant. Warner read to those employees a letter composed by Respondent's labor relations attorney. That letter is captioned ''JIM WARNER STATEMENT,'' and reads:

> I have been told by Hank Codd that he received a letter from District 98 of the Machinists saying that they had union cards signed by a majority of you guys. First of all, I don't believe that a majority of you have actually signed union cards. Secondly, even if you did sign one to get some union guy who was hassling you off your back, you should realize that having a union here in this facility, particularly District 98 of the Machinists, would not be in your best interests. Just so that there are no misunderstandings, you should know that the company is opposed to a union in this plant, and Hank Codd has told me that the company will do everything legally within its power to oppose the union. I think the only thing the union wants for you is to try to secure jobs for people in the main plant if there is a layoff there. Obviously, whenever it comes down to what's good for you guys and what's good for the guys in the main plant, the union will side with those guys. The Company views you as one of four guys. To the Union, you'll be one of 350! So look long and hard before you decide about this union. I'm sure you'll agree with me that it is not in your best interest.

Apart from the letter, according to Carnell, Warner also told them that because of the Union's effort to organize them, their overtime hours were going to be eliminated[4] and that if the union activity continued, Respondent would further reduce their hours and even shut down the plant and move it to Virginia, where the Company had originally intended to locate it. Generally, the testimony of Carnell was corroborated by Rossman and Hollern, and, having carefully reviewed the record, I credit those accounts despite testimony from Lindsey to the effect that Warner made no reference to a reduction in hours and Warner's testimony that he simply read from the contents of the letter.

Later on in the day at about 2:30 p.m. in the shop office, Warner again spoke to all four employees, this time advising him that he had been mistaken about the reason for the elimination of their overtime; that their overtime was being eliminated because of a lack of work. Despite Warner's somewhat vague denial, I conclude that he did return and offer this revised rationale to the employees for the elimination of their overtime. It is undisputed that overtime was eliminated at this time.

Thereafter, sometime in early August, according to Carnell, while working with Lindsey, he was approached by Warner who asked him if he would be honest in telling him if he had signed an authorization card. Carnell said that he would, but when Warner asked him, he denied it. Again on about August 10, while in Warner's office, Warner told Carnell that he thought that the authorization cards had been forged but that if they were not forged, he did not suspect Carnell and Lindsey, and asked if Carnell had heard anything from Rossman and Hollern about their signing authorization cards. Carnell denied any such knowledge. In this regard, Carnell testified:

> He had—he had stated that he thought these cards were forged, but if they weren't, that there is two people that they would suspect have signed cards, and that Jim Lindsey and myself was not one of them, and then he had asked me if I had heard anything from Mike and Steve, on whether they had signed cards . . . . and I said no.

Carnell further testified that on about August 17, in a discussion at the plant, Warner apologized to him for having said what he had and that it was his opinion that if things continued with the Union, the plant would shut down. Warner denied having asked questions about authorization cards, and testified that he had been advised as of July 27 by Respondent's attorney about what to say during the union organizational campaign. Nonetheless, having reviewed all the relevant testimony, I am persuaded that Carnell's version of these events is credible.

Also, according to Rossman, in about mid-August, Warner met with himself, Hollern, and Carnell and told them that Respondent had their authorization cards and they were going to check them against their ''W-2 forms'' because they felt the cards were forgeries, and told them that Ed Smithe, the owner, would rather have the plant closed down than allow it to go union.

Beginning on August 23, Hollern, Carnell and Rossman wore union buttons on their hats and all of them were observed by Warner so adorned. It was on the following day, Friday, August 24, that Hollern was laid off. On Monday, August 27, Rossman was reduced to 20 hours per week and on Tuesday, August 28, Rossman was laid off.

With respect to the elimination of overtime and the layoffs, Warner testified that improved equipment was installed, facilitating the production process, during the months of May, June, and July 1990. According to Respondent's witnesses, the improvements had the effect of reducing the number of rejected parts and therefore the necessity to redo them. It does not however appear, despite the improvements, that hours were reduced during those months, since the 1 hour of daily overtime was not eliminated until July 30, and thereafter until the discharges of Hollern and Rossman, the employees at the urethane plant continued to be employed full-time.

[4] The record supports the conclusion that during the weeks prior to July 30, the urethane plant employees were working 5 hours of overtime weekly on a regular basis.

Warner testified that he was told by Evers McCoy, purchasing manager and also his supervisor,[5] that since the orders for the urethane plant were not coming in from Scott Zsifkov, planning supervisor in charge of maintaining the parts inventory, that he should review the need for overtime. Warner met with McCoy on about July 25. McCoy told him about the transfer of some 9 or 10 employees out of the lathe department to other departments in July and that since the lathe department generated most of the work in the urethane plant, this had caused a reduction in jobs coming to the urethane plant from the main plant and that overtime should be and it was eliminated on the following Monday.

With respect to Hollern's layoff on August 24, Warner testified that on August 23, McCoy contacted him and asked him to review the jobs pending ''on the Board'' in the urethane plant. According to McCoy, this review was made necessary by his evaluation that the orders were down because of the previously noted transfers from the lathe department and information from Zsifkov that customer orders were down. Zsifkov confirmed that overall customer replacement parts order were down which would include urethane coated parts. Warner reviewed the number of jobs in the urethane plant and prepared a list of jobs and orders, and testified that incoming jobs to the urethane plant had come almost to a halt.[6] However, Hollern and Rossman testified that the level of work in the urethane plant remained basically unchanged throughout their employment up to their discharges, and Carnell testified that the work remained steady until the layoffs.

On August 24, McCoy and Warner met with Codd and showed him the list of job orders from the ''Board.'' He explained that there was little to do in the urethane plant. McCoy spoke about the lack of orders from the main plant. Warner expressed the opinion that 40 hours should be reduced from the manpower in the urethane plant. All agreed, and Codd called Respondent's attorney who advised him that the should handle the matter just as he would if there were no union organizing. Codd directed Warner to lay off the least senior man in the urethane plant, who was Hollern. On the same day, Friday, August 24, Warner called Hollern to his office and read to him the following letter prepared by Respondent's attorney.

DRAFT OF STATEMENT TO EMPLOYEE

> Mike, I'm sorry to have to tell you this but it probably doesn't come as a surprise. I'm going to have to lay you off because there is simply not enough work in the shop. I have tried to string it out, hoping that we'd get a bunch of orders in but they just haven't come. Therefore, I am going to have to lay you off and hope that I can find enough work to at least keep the other 3 guys busy. Frankly Mike, as I see it, it's highly unlikely that you will be recalled because I just don't anticipate the orders picking up. You can see for yourself that the last two or three months the jobs have been steadily diminishing and there's no reason to expect it to increase in the future. Therefore, you should go look for work. You are a good worker Mike and if you need a reference I'll be happy to give you one.

On Monday, August 27, Lindsey returned from vacation. According to Warner, he had ''overlooked'' Lindsey's return from vacation and came to the realization that there was not enough work, even with Hollern laid off, to utilize all three of the remaining employees. He estimated the need to cut 20 more hours from the collective workweek. He went to Codd, who again called Respondent's attorney, and was advised, as before, to do as it would have been done if the Union were not organizing. On that day, Warner reduced Rossman from 40 to 20 hours per week, since he was now the least senior employee. On the following day, August 28, according to Warner, he again looked over the work in the urethane plant and decided that he would have to reduce by another 20 hours and again went to Codd who agreed, with the result that Rossman's remaining 20 hours were taken and he was terminated. Like Hollern, he was called to Warner's office and read substantially the same letter.

Warner testified that since the terminations of Hollern and Rossman, they have had no difficulty in performing the work coming into the urethane plant with the remaining employees, i.e., Warner, Lindsey, and Carnell, although it does appear that in January, they worked 2 hours a day overtime for 5 days. In this regard, Carnell testified that prior to the layoffs, Warner and Lindsey, who were respectively supervisor and leadman, spent most of the workday in the office but that since the layoffs, both spent a majority of their working day doing the production work previously performed by Hollern and Rossman.

B. *Discussion and Analysis*

1. The 8(a)(1) violations

Having concluded that Warner, on July 30, threatened employees with elimination of overtime for having sought union representation, I further conclude that such remarks constitute unlawful coercion, despite Warner's efforts to retract those statements later on the same day. As noted above, Warner also threatened that the plant would close if the employees continued to seek union representation and relocate to another State. Employees have the right to select union representation, free from interference by the employer. Such threats to their employment status clearly constitute coercion within the meaning of Section 8(a)(1) of the Act.

As set out above in greater detail, during the month of August, Warner, in conversations with Carnell, Hollern, and Rossman, inquired about their having signed union authorization cards. Such questioning by a supervisor with the discharge authority displayed herein by Warner in the layoffs of Hollern and Rossman, cannot be regarded as innocuous, and I conclude that this interrogation was unlawful.

Also, on about August 10, Warner told Carnell that he suspected two employees of signing union authorization cards, but not Carnell or Lindsey. Obviously, this left only Hollern and Rossman. Thus, having told Carnell, albeit inferentially, that Hollern and Rossman were suspect, the impression is necessarily conveyed that the basis for the suspicions came from some prior surveillance of the organizational activities

[5] While McCoy's title was purchasing manager, it appears also that he had responsibility for production at the urethane plant, since originally the urethane operation was performed and purchased from out-of-plant manufacturers. McCoy reports to plant owner Smithe.

[6] Warner's job list, however, shows only jobs and job numbers and does not reflect the size of the jobs nor the number of man-hours it would take to complete that work.

of Hollern and Rossman. These remarks are unlawfully coercive since they imply to Carnell that Hollern and Rossman's union activities had been under surveillance.

2. Discrimination in the elimination of overtime and terminations

a. *Elimination of overtime*

The record discloses that all four employees, except for leadman Lindsey, were interested in joining the Union, which already represented all 350 production and maintenance employees at the main plant. All three signed union authorization cards on June 18. Warner concedes that as early as July 13 or 14, he was advised by McCoy that there was a ''chance'' that Union cards had been signed in the urethane plant. While it was clear that the employees were engaged in union activity and were seeking union representation, the issue remains whether their discharges were motivated by that activity.

The General Counsel takes the position that the elimination of overtime for the urethane plant employees was prompted their union activity. Respondent argues that improved production equipment and a reduced workload were the cause.

The record discloses that the Union requested recognition by letter dated July 24 and that Respondent rejected that request by letter of July 30. On July 25, McCoy eliminated overtime in the urethane plant as of July 30. The record also discloses that on July 30, Warner, in addressing the employees, made unlawful coercive remarks in violation of Section 8(a)(1) of the Act, including a statement that overtime would be eliminated because of the union campaign. In addition to constituting a violation of Section 8(a)(1), on the heels of the Union's demand for recognition, that statement, particularly in a context of other unlawful coercive statements, provides clear, direct and convincing evidence of motivation with respect to the elimination of overtime.[7]

Respondent also argues that a nondiscriminatory, economic motivation for both the elimination of overtime and the layoffs of Rossman and Hollern are made clear by the fact that since July 30, even after the elimination of overtime and layoffs, the work in the urethane plant has been done without working overtime. This appears to be accurate except for 1 week in January 1991 noted above. However, it also appears that during this time Lindsey and Warner did production work which had previously been done not by them, but by Rossman and Hollern, and no longer spent their time in the office as had previously been the case. In these circumstances, it would not be extraordinary for Respondent to be able to perform the urethane plant work without substantial overtime, particularly where Respondent was in a position to control the flow of work to the urethane plant, and the record contains no specifics to establish comparisons between the amounts of work done before the elimination of overtime and the layoffs as opposed to after those events.

Respondent also contends that the elimination of overtime was justified by the temporary transfer of some employees out of the lathe department, which provides work to the urethane plant, resulting in a loss of work to the urethane plant. However, Respondent's witnesses testified only in general terms about the reduction of jobs going to the urethane plant, failing to provide probative documentation or even testimonial specifics to support that position. Balancing such vague and nonspecific testimony against the direct evidence of unlawful motivation provided by Warner's statements to employees satisfies me that the elimination of overtime was motivated by antiunion considerations and violates Section 8(a)(3) of the Act.

b. *Terminations of Hollern and Rossman*

Respondent, as noted above, engaged in unlawful coercion of urethane plant employees by telling them that the plant would close if the organizational effort continued, unlawfully interrogated them and created among them the impression that the union activities of others were being surveyed. In essence, Warner identified to Carnell his suspicions that Hollern and Rossman had signed authorization cards in mid-August. All this was followed on August 24 by the layoff of Hollern and reduction in hours and subsequent layoff of Rossman on August 28.

As with the elimination of overtime, Respondent's position is that these layoffs were made for valid economic reasons as a result of a reduction in the number of jobs going to the urethane plant. Respondent points out that during May, June, and July, improvements in certain machinery and equipment in the urethane plant reduced the number of pieces being rejected and redone, and cites the continuing effect of the transfer of employees out of the lathe department which had provided work for the urethane plant. However, these assertions are not substantiated by either specific testimony or documentation. While Respondent did introduce a document which it relied on in making the layoffs, purporting to show the number of jobs currently ''on the Board'' in the urethane plant, this document reveals only a job and a job number. It tells nothing about the volume or man-hours that might be required to do the job. In short, the list of jobs ''on the Board'' as of August 24 is not probative as to the man-hours of work in the urethane plant at that time.

Likewise, the general testimony of Warner concerning his reviews of the workloads on August 27 and 28 offered as justification for Rossman's reduced hours and discharge was vague and unimpressive, particularly since the reviews also rely on Warner's list of jobs ''on the Board'' in the urethane plant, and are not an accurate reflection of work in the urethane plant. General Counsel, on the other hand, presented witnesses, including Carnell, who is still employed, who testified to the effect that while improvements have been made in the machinery, the workload was not diminished and there was plenty of work.

In connection with Rossman's discharge, I find it incredible that in a plant with only four employees, Warner would forget that one of them, Lindsey, was on vacation, requiring on his return a 20-hour reduction and on the following day the discharge of that employee.

As with the elimination of overtime, Respondent argues that since it has performed the urethane plant work with three men, and mostly without overtime since the layoffs, this supports its economic defense of decreased demand. As noted above, when production work is now being done by

[7] In light of such convincing evidence, any previous general observations by Warner suggesting the possibility that overtime might be reduced are not persuasive.

a supervisor and a leadman, which was not done before, this result is not extraordinary.

In summary, I conclude that Hollern was discharged and Rossman's hours reduced and he was subsequently discharged because of their union activity and not for any economically justifiable reason. In applying the *Wright Line*[8] theory to the allegations of discrimination in this case, I am satisfied that, given the timing of the discrimination; the direct evidence of discriminatory motive; the substantiated allegations of coercion found herein which also provide evidence of unlawful motivation; and the testimony of the General Counsel's witnesses, particularly Carnell, a current employee testifying against the interests of his employer to the effect that the work being done in the plant was undiminished; the General Counsel has made out a prima face showing that union activity was a motivating factor in the elimination of overtime and in the terminations. Further, I am also satisfied that Respondent's vague and unspecific efforts to demonstrate a lawful economic motivation are inadequate and Respondent has failed to demonstrate that these actions would have taken place even in the absence of the protected concerted activity.

3. Objections and challenged ballots

Having concluded that Respondent violated Section 8(a)(1) and (3) of the Act as set out above, I further conclude that those violations, to the extent that they are coextensive with the objections, warrant setting aside the election conducted on October 5, 1990, which I hereby recommend.[9]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent, as set forth in section III, above, occurring in connection with the Respondent Employer's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I have found that Respondent discharged Michael Hollern and Steve Rossman for reasons which offended the provisions of Section 8(a)(3) and (1) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them. All backpay and reimbursement provided herein, with interest, shall be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The Union contends that under the authority of *Gissel*,[10] the unfair labor practices alleged herein are so serious and pervasive as to warrant the imposition of a bargaining order on Respondent, notwithstanding the absence of an election of established majority. I agree. In this regard, I note that as of June 18, when Carnell, Hollern and Rossman signed authorization cards, the Union enjoyed majority representation in the bargaining unit. When Respondent unlawfully discharged Hollern and Rossman for their union activity, Respondent destroyed that majority, and precluded, on challenges to the ballots of Hollern and Rossman, any possibility of the Union attaining majority status through an election. Unlawfully discharging half of the four man unit, together with election challenges to those ballots, make it impossible for the Union to have won the election.[11] Other Respondent misconduct was also destructive. As noted above, Respondent reduced the hours of employees and threatened plant closure. Threats of plant closure have long been viewed as flagrant since they represent a present threat of unemployment. *International Door*, 303 NLRB 582 (1991); *BI-LO*, 303 NLRB 749 (1991); *Somerset Welding & Steel*, 304 NLRB 32 (1991). In addition, Respondent interrogated employees and created the impression among the employees that their union activities were under surveillance. In such a small unit, the impact of this unlawful activity is magnified.[12] The Board has held:

> Based on the totality of the Respondent's unlawful conduct, we conclude that the lingering effects of the Respondent's unfair labor practices make the likelihood of conducting a fair second election in the foreseeable future so slight that, on balance, it is preferable to rely on the majority employee preference expressed through valid authorization cards.[13]

Those principles apply to the instant case, and, accordingly, I shall recommend a bargaining order herein.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employed by the Employer at its R.D. 2, Duncansville, Pennsylvania facility; excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. On June 18, 1989, a majority of the employees of Respondent, F. L. Smith Machine Company, Inc., in the above appropriate unit, designated and selected the Union, International Association of Machinists and Aerospace Workers

[8] 251 NLRB 1083 (1980).

[9] Obviously, since I have concluded that Hollern and Rossman were unlawfully discharged, they were entitled to vote in the October 5 election, and challenges to their ballots would normally be overruled. However, since I am recommending that the election be set aside, this issue is mooted.

[10] *NLRB v. Gissel*, 395 U.S. 575 (1969).

[11] While it is perhaps likely that overruling and counting the challenged ballots of Hollern and Rossman would have given the Union a majority of the ballots cast, I cannot assume that result.

[12] Respondent's attempts to minimize the impact of the 8(a)(1) and (3) violations by characterizing Warner as a ''low level'' supervisor are not supported by the record. In fact, Warner was the immediate supervisor of all four employees employed at the urethane plant. He was the Respondent's sole on-site representative in that plant and was instrumental in effecting all of the discrimination found herein.

[13] *BI-LO*, supra at fn. 5.

as their representative for the purposes of collective bargaining.

5. At all times since June 18, 1989, by virtue of Section 9(a) of the Act, the above Union has been and is the exclusive representative of the employees in the appropriate unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. By threatening employees with reduced hours and plant closure for supporting the Union, Respondent violated Section 8(a)(1) of the Act.

7. By interrogating employees concerning the union activities of themselves and other employees, Respondent has violated Section 8(a)(1) of the Act.

8. By creating the impression among its employees that their union activities were under surveillance, Respondent has violated Section 8(a)(1) of the Act.

9. By reducing work hours and terminating employees, Respondent has violated Section 8(a)(3) of the Act.

10. By refusing, on or about July 30, 1990, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the unit described above, Respondent violated Section 8(a)(5) and (1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, F. L. Smithe Machine Company, Inc., Duncansville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that their hours would be reduced if they supported the Union.

(b) Threatening employees that the urethane plant would close if they supported the Union.

(c) Interrogating employees about their union activities and the union activities of other employees.

(d) Creating the impression among employees that their union activities were under surveillance.

(e) Reducing the hours of work of employees because of their activities on behalf of the Union.

(f) Discharging employees in order to discourage their activities on behalf of the Union.

(g) Refusing to recognize or bargain collectively in good faith, on request, with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit set forth in paragraph 3 of the conclusions of law set out above.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, set forth above, with respect to rates of pay, hours and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Offer to Michael Hollern and Steve Rossman immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment and make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

(c) Remove from its files any reference to the discharges of Michael Hollern and Steve Rossman, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records and all other records necessary to analyze the amount of backpay due herein.

(e) Post at its facilities at Duncansville, Pennsylvania, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees that their hours will be reduced if they support the Union.

WE WILL NOT threaten employees that the urethane plant will close if they support the Union.

WE WILL NOT interrogate employees about their union activities and the union activities of other employees.

WE WILL NOT create the impression among employees that their union activities are under surveillance.

WE WILL NOT reduce the hours of work of employees because of their activities on behalf of the Union.

WE WILL NOT discharge employees in order to discourage their membership in or activities on behalf of District Lodge

No. 98, International Association of Machinists and Aerospace Workers, AFL–CIO.

WE WILL NOT refuse to recognize or bargain collectively in good faith, on request, with International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive collective-bargaining representative of our employees in the appropriate unit. The unit is:

> All production and maintenance employed by the Employer at its R.D. 2, Duncansville, Pennsylvania, facility; excluding all office clerical employees and professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, set forth above, with respect to rates of pay, hours and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL offer to Michael Hollern and Steve Rossman immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment and make them whole for any loss of pay they may have suffered as a result of our discrimination against them.

WE WILL remove from our files any reference to the discharges of Michael Hollern and Steve Rossman, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel action against them.

F. L. SMITHE MACHINE COMPANY, INC.